Petition

81-1771

No.

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1981

CENTRAL MOTORS, INC., and FRANK PORTER,
Respondents,

vs.

CITY OF BEACHWOOD, OHIO,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Whether a municipality's failure to exercise its police powers to zone property to its most valuable use renders a zoning ordinance unconstitutional, where the use permitted is both economically viable and an advancement of several legitimate municipal interests.

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OPINIONS BELOW

The Court of Common Pleas of Cuyahoga County found for the City of Beachwood in Respondents' Declaratory Judgment challenge to the constitutionality of local zoning in an opinion filed June 11, 1980. The Court of Appeals of Ohio, Eighth Appellate District, reversed the trial court in an opinion filed on August 6, 1981. A written dissenting opinion was also filed at that time. Petitioner's Motion for an Order Directing the Eighth Appellate District Court of Appeals to Certify its Record was overruled by the Supreme Court of Ohio on November 25, 1981, and the Supreme Court sua sponte dismissed the timely appeal on November 25, 1981. Petitioner's Motion for a Rehearing was denied by the Supreme Court of Ohio on January 13, 1982. All of these opinions and judgments below are attached hereto in the Appendix.

STATEMENT OF JURISDICTION

Petitioner's appeal was dismissed by the Supreme Court of Ohio on November 25, 1981. Petitioner's Motion for a Rehearing was denied on January 13, 1982. This Supreme Court of the United States issued an order extending the time to file the Petition for Writ of Certiorari to and including March 25, 1982.

The United States Supreme Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer to a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article XVIII Section 3

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The Charter of the City of Beachwood, Ohio, provides in relevant part as follows:

Article I

POWERS

The City of Beachwood, hereinafter referred to as the Municipality as its limits are now or may hereafter be, shall continue to be a municipal corporation of the State of Ohio under the same name.

There are hereby reserved to the Municipality of Beachwood all powers, general or special, governmental or proprietary, which may now or hereafter lawfully be possessed or exercised by any municipal corporation of Ohio. No enumeration herein of specific powers shall be held to be exclusive.

The powers of this Municipality may be exercised in the manner prescribed in this Charter, or, to the extent that the manner is not prescribed herein, in such manner as the Council may prescribe by ordinance. The powers of this Municipality may also be exercised, except as a contrary intent appears in this Charter or in the enactments

of the Council conformable hereto, in such manner as may now or hereafter by provided by the general law of Ohio.

None of the powers herein reserved shall be withdrawn from the exclusive control of this Municipality nor shall the corporate existence of the Municipality terminate or merge, nor shall any territory be detached from or annexed to this Municipality without the assent of at least a majority of the electors of this Municipality voting upon such proposition.

The relevant Codified Ordinances of the City of Beachwood are included in the Appendix at pages A37-A45.

STATEMENT OF THE CASE

Procedural Background

Respondents filed their Complaint for Declaratory Judgment and Equitable Relief in the Court of Common Pleas of Cuyahoga County in 1978, wherein they sought the declaration that the zoning ordinances of the City of Beachwood were unconstitutional as applied to the whole of their 33+ acres. Trial concluded in December 1979. The trial court found the zoning constitutional, that it bore a reasonable relationship to the public safety, health, and welfare, and was not confiscatory. The trial court also found that the subject property can reasonably and profitably be developed in the office-industrial park district (U-8A), as zoned. Judgment was entered for the City of Beachwood on June 11, 1980.

Upon respondents' appeal, the Eighth Appellate District Court of Appeals reversed the trial court's finding in a split decision on August 6, 1981. The Court of Appeals held that the U-8A zoning of the land in question, while making

development possible, does not have a substantial nexus to the general health, morals, safety and welfare of the community to counterbalance the detrimental economic loss placed upon Central Motors, Inc. et al.

The dissenting opinion noted that the majority opinion based its holding on economic considerations in a manner tantamount to a distortion of the law. It also noted that to override the U-8A zoning approved by the City Council on the strength of the evidence presented at the trial made a "mockery" of the City's lawful right to exercise and enforce reasonable land use controls on behalf of its citizens. It noted that the majority opinion expanded the scope of the economic considerations argument to an unprecedented extreme and conflicted with the well-established policy of judicial deference to legislative judgment in land use regulation.

On November 25, 1981 the Supreme Court of Ohio dismissed the City's timely appeal and overruled the City's Motion to Certify without decision. Petitioner's Motion for Rehearing was denied by the Supreme Court of Ohio on January 13, 1982.

Statement of Facts

A copy of the City of Beachwood Zoning Map, trial exhibit 2, is attached hereto in the Appendix (back inside cover) in order to assist the court in visualizing the subject land. Respondents' property has been shaded to permit a quick reference.

The subject of this lawsuit is 33 acres owned by Central Motors, Inc. et al., located to the north of Chagrin Boulevard (US 422), immediately adjacent to the west side of Interstate Highway 271, in the City of Beachwood, Ohio. Central Motors, Inc. et al. has asked the trial court

to declare the zoning of the 33 acres zoned U-8A unconstitutional, and to declare that the entire parcel of property should be zoned U-9 for automobile agencies. (U-8A includes professional, administrative, executive, governmental and public utility offices, excluding health services; research and development laboratories or testing offices; wholesale offices and showrooms, manufacturing and assembling.) Respondents' land is unimproved, except for four sub-lots shown on the zoning map fronting on Chagrin Boulevard where a small non-conforming building exists.

Historically, Respondents' land was zoned residential. In 1956 the City of Beachwood rezoned a part of what later became Central's land to a class U-7 industrial park district. When Central purchased this land in 1959 it was zoned partly residential and partly U-7 industrial park. The U-7 classification is a restricted industrial park use, requiring low-density building space with a three-story maximum height restriction. Interstate 271 was constructed in 1963 splitting Central Motors' property into two segments. The unusual configuration of Central's land, is, therefore, a result of the "taking" by the State of Ohio to construct I-271, for which Central has admitted it received compensation.

In 1968 at Central's request, six acres bordering the I-271 exit ramp on the eastern boundary and abutting Chagrin Boulevard on the south were rezoned for "motor service" use (U-9), which property has not been developed. The U-9 district is a less restrictive use allowing the erection of motels, hotels, restaurants, gas stations, and, notably, automobile agencies. The use is considered to be highly intensive for commercial purposes, imposing less restrictive building-to-land ratios and allowing buildings up to 60 feet in height. In 1974, Respondents presented a proposal to the City calling for the erection of several automobile

dealerships, multi-story office and apartment buildings, a roadway, plus improvements of utilities, including construction of storm and sanitation sewage systems. After administrative process, the City Planning Commission rejected the plan.

At the time of the 1974 application for rezoning by Central, the Regional Planning Commission was making a study of the subject area. It recommended to Beachwood City Council that residentially zoned areas of Central's property be rezoned to U-7 (industrial district) to conform to other U-7 zoning. Beachwood City Council did adopt this recommendation, and rezoned the property. A continuing study of the area then further updated the zoning and a new district was recommended. That new classification, U-8A, consisted of a combination of standards taken out of the prior existing U-8 and U-7 classifications to encourage the early development of the land. Accordingly, approximately eighty-eight (88) acres were rezoned to U-8A by Beachwood City Council in June of 1978, including Central's 33 acres as a part of a comprehensive rezoning plan. One of the motivating factors to rezone to U-8A was to accommodate Respondents.

The U-8A use is less restrictive than the prior U-7 use, allowing for a greater building density, although still limiting building height to 35 feet. The extraordinary success of a nearby industrial park zoned U-8 to the southwest of Central's land in Beachwood was a convincing factor that the subject property and the U-8A classification would also prosper.

The City has always opposed a retail intrusion north of a zoning line approximately 800 feet north of Chagrin Boulevard. The zoning map discloses that the City of Beachwood has a rational balance of residential, office buildings, industrial park, and two retail shopping center

areas. A very minor part of the City has been utilized for a U-9 motor service district. However, the decision of the Ohio Court will permit Respondents to intrude the entire distance of their property, about 2800 feet north of Chagrin Boulevard.

At trial, Central and Beachwood called expert witnesses to testify on the value of the subject land. A brief summary follows:

Central expert witnesses	Mr. Free (appraiser)	U-8A $50,000 (improved) /acre U-7A $100,000/acre U-8 $60,000/acre U-9 $90,000/acre
	Mr. Ritley (appraiser)	U-8A $45,000/acre U-7A $100,000/acre
Beachwood experts	Mr. Chisling (appraiser)	U-8A (improved) $80-$90,000/acre U-8 $65,000/acre
	Mr. Kearns (Director of Real Estate Equity Planning Corporation)	U-8A $85,000/acre *Actual Sale of Adjacent Property*

The City's appraisal expert, Mr. Herbert Chisling, testified that Central's land would be a fine location for wholesale offices, showrooms, and light industrial research buildings in U-8A, and that comparable industrial land in Commerce Park area, located approximately one-half mile west on Chagrin Boulevard from the subject property, is worth in the neighborhood of Sixty-Five Thousand Dollars ($65,000.00) an acre. He stated that Central's land, when improved, has a premium value to the potential occupant because of the visibility it has from I-271, and a value of $80,000 to $90,000 per acre.

Mr. Perry of the Regional Planning Commission, testified as to the viability of a development in the U-8A classification for Central's land and that it fit well with the City's overall zoning plan.

The thrust of Respondents' case was that their land is *worth more* for U-9 auto agencies. Beachwood's defense was that the land is most usable for a U-8A industrial park, as part of its overall zoning plan, and is *worth enough* not to be confiscatory.

REASON FOR GRANTING THE WRIT

THE INTERPRETATION OF THE UNITED ST TES CONSTITUTION BY THE OHIO SUPREME COURT WHICH HOLDS THAT A MUNICIPALITY'S FAILURE TO REZONE 33 ACRES FROM INDUSTRIAL PARK TO RETAIL AUTOMOBILE AGENCIES, ITS HIGHEST FAIR MARKET VALUE, CONSTITUTES A DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

There is more at stake here than one more zoning lawsuit. The actual and practical effect of this decision is to impose stricter constitutional standards on a municipality than those mandated by a line of Supreme Court decisions beginning with *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. A direct, irreconcilable and demonstrable conflict has resulted.

This new stricter standard of constitutional law as pronounced by the Ohio court is:

> ". . . the appellants [respondents] on the other hand have demonstrated that with little or no detriment to the city the appellants [respondents] could develop the land to its highest potential. One ingredient of maximization of the land use is attempting to procure the *highest fair market value* of that land. In the instant case, the U-9 zoning [retail-automobile agencies] fa-

the Eighth Appellate District nor Respondents attempted to distinguish this recognized principle of law:

> "By its nature, zoning 'interferes' significantly with owners' uses of property. It is Hornbook Law that 'mere diminution of market value or interference with a property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' 8 E. McQuillin, Municipal Corporation, Section 25.44, p. 111 (3d ed. 1965). There is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it." *Id.* at 674.

At trial Beachwood proved there is a ready market for U-8A property. Mr. Kearns, developer of a parcel abutting Central's to the west, said he was about to construct (and later did) 103,300 square feet of "sophisticated one-story office distribution warehouse center." (T II 5) This parcel was one of the former U-7 properties rezoned to U-8A with Central's. Mr. Kearns testified his company paid $875,000 for the 10.3 acres. Freeway exposure of Respondents' land was said to make its U-8A land more valuable than the parcel already being developed, and Mr. Kearns testified (T II 11) that he would buy Central's property if it were for sale.

Other testimony—at length—from Mr. Perry, Deputy Director of the Regional Planning Commission and Mr. Chisiing, an expert witness on land development, proved that the Central land could be used, developed and enjoyed in a U-8A, at a value of $80,000 to $90,000 per acre. They testified that years of careful planning had been utilized in Beachwood to create a U-8A district which fit the overall zoning plans of the city and provided a respon-

sible plan of profitable development to the owners. Since Central never offered evidence as to its original cost of the land in 1956, its profit is unknown.

Hence, this court should grant certiorari in order to impress upon the Ohio Supreme Court that an otherwise valid zoning ordinance which deprives the landowner of the most beneficial use of its property would not be unconstitional. *Goldblatt v. Town of Hempstead* (1962), 369 U.S. 590.

After the Ohio Court altered the constitutional standard to be applied, it then measured Beachwood's evidence with a shorter yardstick. Beachwood's zoning did not survive this new test. The Court applied the fairly debatable standard at the impermissible higher (profit) level of "maximization of profits", rather than at the lower (profit) level of "economic viability".

It is a well-established principle that a zoning ordinance is presumptively valid, and that the party assailing its validity must show by clear and convincing evidence that the zoning classification is invalid. *Euclid v. Ambler Realty Co., supra.* At page 388 therein, the Court stated, "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. In prior decisions, Ohio courts have utilized this "fairly debatable" standard in determining the questionable constitutionality of certain zoning ordinances. *See, e.g., Central Motors Corp. v. City of Pepper Pike* (C.A. Cuy. Cty. 1979), 63 Ohio App. 2d 34.

Despite the "fairly debatable" test, mandated by this Court in *Euclid v. Ambler Realty Co., supra,* and its progeny, the Ohio Court convolutes the established standards in order to support its new test of maximization of profits. Relevant portions of the lower court's opinion are quoted

below in order to demonstrate the erroneous reasoning and conclusion:

> "The City of Beachwood's position is that the zoning classification, U-8A, is part of the City's comprehensive master zoning plan limiting commercial growth above a certain point in the City. The reasoning behind this theory is to allow the single family residents in the area to be free from the congestion that comes with commercial and higher density land use. However, the construction of I-271 places a new factor in the City's master zoning plan. The land was purchased by Central before the highway was built." (The Court then discusses the intrusion of I-271 into this area) (Majority Op., p. A21).

The Court of Appeals ignores the circumstance that Beachwood's updated zoning code has fully contemplated I-271, and that zoning of Central's land has followed many years of arduous study and review, with a recommendation of the Regional Planning Commission. The Regional Planning Commission did, however, consider an interstate highway and its effect on neighboring land, including the residential land immediately abutting Central's property to the north.

The Court of Appeals further said:

> "Examining the benefit to the community more closely, this Court does not see a substantial relationship to the common goals of the community. There are some beneficial aspects to U-8A zoning. The U-8A zoning would produce less automobile traffic than a more intensive commercial development. The U-8A zoning would produce less crime, because it would have fewer commercial and retail establishments. The tax benefit to the community is a factor that is difficult if

at all possible to speculate upon. However, for property tax purposes, a more expensive development would result in a greater tax income. The benefits if any were proven at trial to be significant." (Majority Opinion, p. A23).

The Court of Appeals noted some of the factors that Beachwood found significant in zoning this district U-8A. the tax consequences, property tax (only 4 MILLS in Beachwood) versus income tax (1%), are not really debatable. That is a matter solely within the sound discretion of the local government. The City is in a better position to know where its tax advantage lies than the two judges on the Court of Appeals.

Despite the majority's notation that U-8A zoning is a part of a comprehensive master zoning plan; that it allows single family residences to be free from congestion that comes with commercial and higher density land use; that it would produce less automobile traffic than a more intensive retail development; and that it would produce less crime—the Court determined that the landowners challenging the classification had demonstrated that with little or no detriment to the city the land could be developed to its highest potential, thereby "maximizing the versatility to the developer in utilizing the land." This position is in conflict with the Supreme Court's "economic viability" standard.

The dissenting judge on the panel agreed with the trial court that Respondents did not raise the issue beyond fair debate:

". . . But even if one accepted the majority's position the appellants' 'economic enjoyment of their property' is 'crucial' to the case at bar—an approach with which I vigorously disagree—we have two conflicting pro-

> trayals (sic) of the ordinance's economic impact given at trial. On the one hand, according to appellant's [Central's] evidence, the present fair market of this tract is $50,000 an acre versus the $90,000 an acre which the tract would allegedly be worth if rezoned for retail use under U-9; whereas, according to appellee's [Beachwood's] evidence (in support of their position that the current U-8A use is reasonable), the appellant's property has a market value of some $80,000 per acre in its present U-8A classification. Indeed, one of the City's witnesses, Bruce Kearns, a vice-president of a real estate firm, testified that his company had recently purchased property in the vicinity zoned U-8A (the same classification as appellant's property) for over $80,000 an acre. Does not this make even the issue of the parcel's current economic worth on which the majority places so much emphasis a 'fairly debatable' one?" (Dissenting Opinion, pp. A31, 32, footnotes omitted).

Interfaced with the "fairly debatable" test is the established legal principle that the Court cannot usurp the legislative function by substituting its judgment for that of the City Council. In *City of Memphis v. Greene* (1981), 451 U.S. 100, *reh. denied,* ..... U.S. ....., 101 S. Ct. 3100, this honorable court approved the District Court's refusal to review the City's policy decision to close a street in order to avoid anticipated traffic safety problems.

The U-8A zoning classification is a reasonable exercise of the unquestioned legislative authority vested in the City of Beachwood. The specious claim that the ordinance is confiscatory is clearly not supported by the evidence and is contrary to the actual findings of the trial court. Had the Eighth District Court of Appeals applied "economic viability" and not "maximization of profits" to the

"fairly debatable" test, the court would have held that as a matter of law, Respondents' challenge to the zoning restriction did not overcome the strong presumption of constitutionality. Rather than focus the judicial inquiry on whether the challenged restrictions can reasonably be determined to promote the objectives of the community land use plan (*Penn Central Transportation Company v. City of New York* (1978), 438 U.S. 104, *Nectow v. City of Cambridge* (1928), 277 U.S. 183), the Eighth District Court of Appeals was guided by the landowner's profit motive.

CONCLUSION

The Ohio court's decision is in direct conflict with a long line of United States Supreme Court zoning cases. This departure establishes a new and dangerous constitutional standard which will require municipalities to place landowner's ambitions above the public peace, health, safety, and welfare.

Petitioner therefore requests that the Supreme Court issue its Writ of Certiorari to the Supreme Court of Ohio in order to review the issues presented in this cause.

Respectfully submitted,

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Appendix

APPENDIX

MEMORANDUM OF OPINION OF THE COURT OF COMMON PLEAS

(Dated June 11, 1980)

Case No. 979597

IN THE COURT OF COMMON PLEAS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

CENTRAL MOTORS, INC. *et al.*,
Plaintiff,

vs.

CITY OF BEACHWOOD,
Defendant.

MEMORANDUM OF OPINION

NORMAN A. FUERST, J.:

Plaintiffs are the owners of approximately thirty-nine acres of land most of which is unimproved located on the north side of Chagrin Boulevard, immediately adjacent to the westerly side of Interstate Highway 271, in the City of Beachwood, Cuyahoga County, Ohio.

City of Beachwood is a municipal corporation organized and existing under the Constitution and laws of the State of Ohio and is organized by Charter approved and enacted by its people.

The property owned by Plaintiff according to the zoning map of the City of Beachwood, when applied to said property, establishes that Plaintiff's property is zoned partly U-9 and partly U-7, at the time of filing of this action.

On or about February, 1974, Plaintiffs attempted to have said land rezoned. However, Plaintiffs' application for rezoning was denied by defendant, City of Beachwood.

Since that date, Defendant, City of Beachwood, has created a new zoning category known as U-8A and thereby has rezoned the portion of plaintiffs' property from U-7 to U-8A, less restrictive industrial zoning.

As presently zoned, the Plaintiffs can build numerous buildings on their property, and can build an automobile agency and motel on a limited part of Plaintiffs' property, now zoned U-9.

Plaintiffs have asked the Court to render a judgment declaring that the proper zoning of these 33 acres should also be U-9.

Plaintiffs propose to develop this land, which they have owned, for the most part, since 1959, with three auto agencies in the Northern strip along I-271 and office buildings, of heights permitted in U-9, and a motel in the Southern part of the land. The proposed road into Plaintiffs' property would be from Chagrin Boulevard across from Park East just West of the I-271 intersection.

Plaintiffs' plan is for a complete architectural statement encompassing all of their property. The more intense use of the land, the office buildings and the motel, would be closer to Chagrin Boulevard. The auto agencies would be along the narrow Northerly neck of the property which runs about 3300 feet North of Chagrin Boulevard. The

buildings would complement the land. The auto agency buildings would be placed in the land which slopes toward the Freeway. This neck is about 280 feet wide at its Southerly end.

Plaintiffs' property has a limited frontage on Chagrin Boulevard. The 6 acres presently zoned U-9 is the Southeasterly portion of Plaintiffs' land which abuts the exit Ramp of the Freeway.

The area of three quadrants of the Freeway intersection (except for the quadrant on which Plaintiffs' land is located), has already been almost fully developed for retail and commercial purposes; motels, restaurants, office and medical buildings, auto agencies, gas stations and recreational facilities.

Along Chagrin Boulevard on Plaintiffs' quadrant there are presently an auto agency, gas station, restaurant and commercial buildings.

On the other three quadrants, uses, primarily U-9, have been granted by Beachwood to the owners upon request. Only with respect to Plaintiffs' quadrant has this been denied.

Beachwood's zoning ordinance, with reference to Class U-9 Districts, in Section 1131.01 (Plaintiff's Exhibit 1) states:

"It is the intent of this Chapter (Class U-9 Districts) to provide motor service districts on major roads in the immediate vicinity of Freeway interchanges to serve the needs of through and local motorists."

The permitted uses in U-9 Districts are:

1. Gas stations
2. Motels and hotels

3. Restaurants
4. Auto agencies
5. Banks
6. Office buildings (up to 60 feet high exclusive of towers)

Plaintiffs have shown through the testimony of an expert, Mr. Neff, the cost of providing the area with sewers, storm and sanitary and roads. His estimate of $890,000.00 did not include the cost of off-site acquisition of easements.

Witnesses Mr. Free and Mr. Ritley stated that the loss that would be sustained by Plaintiffs by developing under the present zoning. Mr. Free's opinion is, that the property, with improvements in, would be valued as follows:

U-8A - $50,000.00 an acre

U-7A - $100,000.00 an acre

U-8 - $60,000.00 an acre

U-9 - $90,000.00 an acre

The development would require about 4 1/2 acres for roads which would leave about 28 1/2 acres for development.

Mr. Free indicated that a U-9 development could be carried through in substantially less time, resulting in a large saving of a major item of development cost, namely, the cost of money.

Evidence submitted was that the net to the owners with a U-9 development would be $1,551,000.00 while with a U-8A the net would be $703,000.00. By developing only the Southerly 10 acres as presently zoned U-9 and

U-8A the net would be $666,000.00, just slightly less than what would be realized by risking the $890,000.00 + on a U-8A development.

A professional land planner testified to difficulty of developing the property, particularly the Northerly neck, under U-8A. Such development would encounter considerable difficulty in the placement of buildings as well as forfeit the advantages of Plaintiffs' plan to make use of the natural topographical slope toward the Freeway. U-8A would make much more difficult the placement of roads and much more expensive the installation of sewers. Plaintiffs' proposal would be advantageous in working with the property rather than against it and that the plan afforded an opportunity to develop complementary uses which would not antagonize either the property or the area. Mr. Hill concluded that forced U-8A development would be arbitrary and not in keeping with the dominant regional development on all other quadrants of the interchange.

Plaintiff argues that the continued emphasis through the U-8A zoning on research and development and light industrial use is misconceived, that land for such uses is available at much lower cost in other areas and that values in this area do not call for such developments. Plaintiffs further claim that the proposed use of the property is the highest and best use.

The issue is whether the Beachwood Ordinance in preventing the Plaintiffs' proposed use of its land has any reasonable relationship to the legislative exercise of police power by the municipality.

Under Ohio Law, the "fairly debatable" test is used by Courts with respect to the burden of proof necessary to find that a zoning ordinance is unconstitutional. In

Village of Euclid vs. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court held that if the validity of the legislative classification for zoning purposes is "fairly debatable", the legislative judgment must be allowed to control. A comprehensive statement on the law of zoning was outlined by Judge Leis of the Court of Common Pleas, Hamilton County, Ohio, in *Scharnhornst vs. the Zoning Board of Appeals*, 28 Ohio Misc. 37, 273 N.E. 2d 915 (1971):

> Zoning ordinances are a valid exercise of police power. Zoning plans are recognized as an important function of municipal government in the interest of the public welfare, safety and health. A property owner in any municipality adopting a zoning plan has the constitutional right, however, not to be denied his property in any respect without due process of law by such legislative enactments.
>
> By what standards must a court judge the validity of a zoning ordinance? First, there is a presumption of the reasonableness, validity and constitutionality of ordinances, which applies fully to zoning ordinances and amendments of zoning ordinances (see *8McQuillan on municipal corporations*, Section 25.295). Such presumption cannot prevail, however, in the face of showing unreasonableness or arbitrariness. The Supreme Court of Ohio has held that a property owner has no vested right in zoning as it is; that such zoning can be amended for the public good.

The case of *Curtiss vs. City of Cleveland*, 170 Ohio St. 127, 163 N.E. 2d 682, has application.

In the *Curtiss* case, the Court said regarding the facts:

> The record clearly discloses that Appellees were the owners of substantially improved lands and that a substantial actual loss in value (downed from a range

be sufficient to reasonably outweigh the loss to the landowner in order to justify zoning legislation causing such loss by limiting such owner's right to use his property.

5. Any such benefit may be lessened by the facts that a substantial part of the property being zoned has previously been used for uses other than those permitted by the zoning legislation and that very little of such property has previously been used for uses permitted by such legislation.

6. Where property has a substantially lesser value because of use restrictions imposed by zoning legislation, it is not necessary to wait for any further impact on such property from such zoning legislation before seeking injunctive relief therefrom with respect to such property.

The evidence demonstrates that land in a similar zoning category has recently sold adjacent to the Plaintiffs' property to the Equity Planning Corporation for Ninety Thousand Dollars ($90,000.00) per acre, and, the owner of that land testified that he would have paid even more for the Porter piece because of its frontage and, therefore, visibility, along I-271. Since Plaintiffs did not affirmatively prove that Plaintiffs' cost of ownership of the land was more than Ninety Thousand Dollars ($90,000.00) per acre, the Court cannot measure a potential loss to the Plaintiffs, and therefore, find as a matter of fact, that the Plaintiffs have suffered or will suffer any economic loss by developing in the U-8A classification.

The Plaintiffs, in their brief, set forth their argument to the Court, they are basically unhappy with the CITY OF BEACHWOOD because the City did not immediately accept Plaintiffs' development plans. Also, the allegations

of a "bargain" in the brief, are outside of the evidence, have no legal basis whatsoever, and only demonstrate that this is an "emotional" lawsuit, and not a zoning code in the mind of the Plaintiffs.

The Court has the jurisdiction to determine the proper zoning of Plaintiffs' land in a Declaratory Judgment action. *Driscoll vs. Austintown Associates,* 42 Ohio St. 2d 263 (1975); *Flair Corp. vs. Brecksville,* 49 Ohio App. 2d 77 (1976). The Court is fully clothed with the power to declare the reasonable uses of Plaintiffs' property. Plaintiffs believe the reasonable uses are uses presently contained in the Beachwood zoning ordinance, namely U-9, Motor Services District, which was designed by the City to provide the proper uses on major thoroughfares at Freeway interchanges.

The fact that the land can be more profitably developed under different zoning regulations is not sufficient in and of itself to invalidate the present zoning ordinance. *Alsenas vs. City of Brecksville,* 29 Ohio App. 2d 55 (1972); *C. Miller Chevrolet, Inc. vs. City of Willoughby Hills,* 38 Ohio St. 2d 298 (1974). Also the law is clear that a purchaser of real property may not challenge the constitutionality of an ordinance when a suit is based on the loss of profit and restrictions existed at the time of the purchase. *Mintz vs. Village of Pepper Pike,* 57 Ohio App. 2d (1978).

Applying the law with respect to the zoning in question, it is evident that the zoning is constitutional and does bear a reasonable relationship to the public health, safety and welfare. The evidence produced at trial showed that the property in question can be reasonably developed under its present zoning. Also, insofar as the present zoning prohibits Plaintiff from constructing an automobile

agency on the entire parcel in question, that in itself does not make the zoning unreasonable or unconstitutional. The fact that Plaintiffs' proposed use of the land may be more profitable is also not legally significant. Further that the property can be developed into office buildings, motels and an automobile agency does show that the property as zoned can be developed.

Defendant has rezoned a portion of the property from U-7 to U-8A, a less restrictive industrial zoning, and as the evidence showed had invited Plaintiff to participate in its enactment. This rezoning by the City of Beachwood was accomplished when Plaintiff complained that the U-7 zoning was restrictive. All such rezoning along the Chagrin Boulevard area in the City of Beachwood is enacted and revised pursuant to an overall planning and zoning plan of the City and after public hearings. *Curtiss vs. City of Cleveland.*

/s/ NORMAN A. FUERST
Judge

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated August 6, 1981)

No. 42614

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT, COUNTY OF CUYAHOGA

CENTRAL MOTORS, INC., *et al.*,
Appellants

VS

CITY OF BEACHWOOD,
Appellee

APPEAL FROM COMMON PLEAS COURT

No. 979,597

JOURNAL ENTRY AND OPINION

PATTON, *J.*:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

The instant appeal involves the zoning of 33 acres of undeveloped land located in the City of Beachwood, Ohio.

The property, owned by Central Motors Corporation (Central) and Frank Porter, the appellants, is a part of 39 acres of which six acres have been zoned U-9, the classification sought by the appellants for the entire parcel. The property is bounded on the south by Chagrin Boulevard, a four-lane east-west artery, and on the east by the exit ramp of Interstate 271 running north and south. The western boundary runs along the back of low density commercial property. The land has a limited frontage on Chagrin Boulevard and an unusual shape because of the land purchased by the state for the construction of I-271.

The land was originally purchased by Central in 1959 after the bankruptcy of a Van Sweringan company. At the date of purchase, some of the land was zoned for single-family residential use (U-1A-1), and the remainder was zoned for research and testing laboratory use (U-7). The U-7 classification is a restricted commercial use, requiring low-density building space with a three-story maximum height restriction.

The appellants requested and received a change in the zoning for the six acres of the parcel bordering the I-271 ramp on the eastern boundary and abutting Chagrin Boulevard on the south. The six acres were rezoned U-9 for "motor service". The U-9 zoning is a less restrictive use allowing the erection of motels, hotels, restaurants, gas stations, and notably, automobile agencies. The permissible use of the land under this zoning classification is intensive for commercial purposes. It requires less inhibitive building-to-land area ratios, and in addition, it allows buildings up to 60 feet in height.

The land surrounding the Chagrin I-271 interchange evolved from the 1960's onward and became a developed commercial and retail location. The northeast, southeast

and southwest quadrants of the interchange were all rezoned for U-9 use. These corners now are occupied by two mid-rise motels, car dealerships and gas stations.

The appellants' land bordering the north side of Chagrin is zoned for U-9 use. Another small strip of land by Chagrin is zoned U-8A, which limits building height to 35 feet and does not allow retail use. The U-8A classification emphasizes corporate headquarters and low density research facilities. The appellants seek to have the U-8A zoned parcel and the U-7 parcel[1] rezoned for U-9 use.

The appellants have attempted to have their remaining 33 acres of non-U-9 zoned land reclassified since 1974. Frank Porter testified in detail concerning a comprehensive business venture he proposed for the parcel of land in question. He and several automobile dealers set forth a proposal for the use of the land which included the building of several automobile dealerships on a street to be created running north and south on the property. The dealerships were to run between the new road and I-271, fronting on the new road. The comprehensive plan also called for multi-story office and apartment buildings and improvements of utilities such as storm and sanitation sewage systems.

The plan was rejected by the city planning commission. A short time thereafter, the city planning commission rezoned 10 acres of land on the southwest quadrant of the Chagrin - I-271 intersection for U-9 use to enable the erection of a large multi-story hotel. The appellants filed suit against the city, asserting in their cause of action that the city's decision was arbitrarily and unconstitutionally enforcing its zoning code. The city came to an

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1. Later rezoned to U-8A use.

agreement with the appellants resulting in a voluntary dismissal of the suit. Porter testified that the city law director had agreed to aid the appellants in pursuing rezoning for the 33 acres which would enable them to implement their development proposal.

The city refused to grant their rezoning request, and as a result of the city's refusal, the appellants filed the instant action in 1978. The suit requested the court declare as unconstitutional the U-7 zoning of its 33 acres of land north of Chagrin. The city then acted to rezone the 33 acres but the classification change was to U-8A, a zoning less restrictive than U-7 but still limiting retail use and building height to 35 feet.

A trial was held by the Common Pleas Court sitting without a jury. Testimony was taken from experts for both sides. The appellants argued that although the City of Beachwood had a master plan, it had made numerous rezoning exceptions to the plan in that area. The present U-8A zoning was asserted as being too restrictive for the location. Testimony was presented that indicated the property could be developed under the present zoning. However, there would be a substantial reduction in land value and potential uses under the present zoning scheme. It was pointed out that the large Marriott Hotel complex was rezoned as had been other property in the area.

The appellants' witnesses demonstrated that the demography of the land would complement the use of land as car dealerships because they would be hidden from the west by a rise in elevation. The dealerships located between I-271 and a road parallel to it would provide the dealers with exposure on I-271 yet not border any noncommercial use. Testimony also verified that the dealerships' busy hours were nonpeak traffic hours for the area.

The appellees testified as to the theory behind the city's master zoning plan and about the congestion in the area. The city's witnesses testified about potential uses under the existing zoning.

Upon considering the evidence the trial judge found the application of the zoning code to be constitutional as applied to the appellants' land. From that decision the appellants appeal, asserting four assignments of error:

I. THE COURT ERRED IN FINDING THAT THE BEACHWOOD ZONING ORDINANCE WAS CONSTITUTIONAL AS APPLIED TO THE 150 FOOT STRIP OF PLAINTIFFS' LAND FRONTING ON CHAGRIN BOULEVARD WHICH IS ZONED U-8A WHILE THE PROPERTY ON BOTH SIDES OF THIS STRIP IS ZONED U-9.

II. THE COURT ERRED IN FINDING THAT THE BEACHWOOD ZONING ORDINANCE WAS CONSTITUTIONAL AND NOT VOID AS APPLIED TO PLAINTIFFS' PROPERTY IN THAT BY THE TERMS OF THE ORDINANCE ITSELF THE U-9 CLASSIFICATION IS INTENDED TO PROVIDE MOTOR SERVICE DISTRICTS ON MAJOR ROADS IN THE IMMEDIATE VICINITY OF FREEWAY INTERCHANGES, THE VERY LOCATION OF PLAINTIFFS' PROPERTY, AND THE DESIGNATION OF A U-8A CLASSIFICATION IS DIRECTLY CONTRARY TO THE TERMS OF THE ORDINANCE.

III. THE COURT ERRED IN FINDING THE BEACHWOOD ZONING ORDINANCE AND THE U-8A CLASSIFICATION CONSTITUTIONAL AS APPLIED TO PLAINTIFFS' PROPERTY WHEN ALL OTHER QUADRANTS

OF THE INTERCHANGE HAVE BEEN PERMITTED DEVELOPMENT WITH A SUPERIOR ZONING CLASSIFICATION.

IV. THE COURT ERRED IN FAILING TO GRANT APPELLANTS RELIEF WITH RESPECT TO THE INSTALLATION OF SANITARY SEWERS TO SERVICE APPELLANTS' PROPERTY.

I.

The appellants' first assignment of error asserts that the Beachwood zoning ordinance is unconstitutional as applied to the 150 foot strip of the appellants' land fronting on Chagrin Boulevard zoned U-8A.

The zoning law in Ohio is well established. The party challenging the zoning ordinance's constitutionality bears the burden of proving beyond fair debate that the ordinance is arbitrary and confiscatory. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23; and *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34. In order to meet this burden, the party must prove that the alleged arbitrary and confiscatory ordinance is unreasonable in that it does not further a goal that relates to public health, safety, morals or general welfare goals of the community. *Euclid v. Ambler Realty Co., supra* at 390.

In the instant suit, the debate concerning the 150 foot strip of Chagrin Boulevard frontage zoned U-8A is brief, because the trial court focused on the larger parcel of property zoned U-8A set behind the Chagrin frontage. However, Robert Perry, a city planner on the Regional Planning Commission, discussed the 150 foot strip of Chagrin Boulevard frontage, which runs 500 to 1000 feet in depth (R. 2-35). Mr. Perry was cross-examined as to the 150 foot strip and he stated that in October, 1975,

the recommendation was made that the "strip" ultimately be rezoned to conform with the U-9 zoning of the connected Chagrin Boulevard lots (R. 2-53). The recommendation was not adopted.

The appellee argues that the subject was not properly argued before the trial court nor set forth in the pleadings. We find no merit in that proposition. Since the state has adopted the Rules of Civil Procedure issues no longer need to be expressly framed by the pleadings if they are tried by express or implied consent of the parties. They shall be tried as if they were raised in the pleadings if both parties consent at trial. There is significant testimony in the record to indicate that the issue was considered and argued by both parties for purposes of Civ. R. 15(B).

In analyzing the property in question, the map indicates that the 150 foot strip was specifically zoned U-8A to prevent development of the entire strip of U-9 frontage on Chagrin Boulevard. A review of the maps used as exhibits clearly demonstrates the purpose for the more restrictive zoning. The 150 foot strip of property enters Chagrin Boulevard directly across from a preexisting street. The city, seeking to provide access to 33 acres of what would be a landlocked area, limited this parcel of land to facilitate what eventually may be a street.

The city's intention is clear. The city used the U-8A zoning to prevent the appellants from developing the entire Chagrin Boulevard frontage property. It was evident from the exhibits that the access to the 33 acres in question is limited. The city in the interests of traffic control would like to route the potential road from the property into Chagrin Boulevard at this point.

The lone justification vocalized by the city for applying the U-8A zoning to the appellants' land was that

they did not want retail establishments more than 500 to 1000 feet north of Chagrin Boulevard. The city stated it wanted a barrier to keep commercial traffic away from the residential areas. Since the 150 foot strip was well within the area they had approved for U-9 zoning, the city had no compelling argument to restrict the parcel. The land located immediately across the boulevard and on both sides of the strip was classified U-9. There was no other evidence in the record which provided a reasonable theory for the zoning beyond the desire of the city to have the access road to the back property built in the 150 foot strip. The city's rationale for the zoning of the strip is unreasonable and arbitrary. The city, if it desires to have a road built at that location, has more precise legal means, such as easements, to facilitate that purpose. The restriction of the appellants by means of a zoning classification which circumvents the appellants' desired uses for the land is unreasonable.

The present zoning program does not prevent the appellant from developing the land but does interrupt the use of the large piece of land fronting on Chagrin Boulevard owned by the appellants. The city did not present any sound evidence to justify the spot zoning in the appellants' land. The appellants on the other hand have demonstrated that the ordinance's application is unconstitutional and beyond the reach of fair debate. *Euclid v. Ambler, supra.* The city's own expert recommended it be zoned U-9. The application of the U-8A classification to the 150 foot strip is unreasonable and not in the interest of public health, safety, morals and the general welfare of the Beachwood citizens.

Therefore, in light of the fact the city presented no reasonable relationship between the interests of the City of Beachwood and the zoning classification, we find the

ordinance unconstitutional. No legal theories validate the application of the U-8A classification to the 150 foot parcel fronting on Chagrin Boulevard.

The appellant's assignment of error is well taken. The trial court erred in failing to reverse the ordinance of the City of Beachwood with regard to this parcel of the appellants' property.

II. & III.

The threshold question contained in both the second and third assignments of error challenges the constitutionality of the U-8A use classification applied to the remaining 33 acres in question. The two assignments of error are closely related and will be considered together.

The constitutionality of a zoning ordinance depends upon the legislative judgment of that ordinance. If the ordinance by its application is clearly arbitrary, unreasonable and bears no substantial relationship to the public health safety, morals or general welfare, then it can be declared unconstitutional. The challenger bears the burden of overcoming the presumption of regularity. The degree of proof adopted in Ohio for a zoning ordinance challenge is the "fairly debatable" test. This standard of proof has evolved from the United States Supreme Court decision of *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. The United States Supreme Court's application of this standard set a standard upon which Ohio has measured its zoning statutes. To measure a zoning ordinance's validity, the ordinance must not pass the bounds of reason and assume a character of mere arbitrary fiat by the legislature. *Euclid v. Ambler Realty Co., supra* at 389.

In Ohio, we have long accepted the fact that an invalid zoning ordinance must be beyond fair debate before that

ordinance will be declared unconstitutional. The standard was thoroughly explained in *Central Motors Corp. v. Pepper Pike, supra* at 51, when this court stated:

> The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.

The debate in question concerns whether the provisions of the Beachwood zoning ordinance classifying Central's 33 acres are clearly arbitrary, unreasonable, and bear no substantial relationship to the public health, safety, morals or general welfare. *Euclid v. Ambler Realty Co., supra* at 395. If the questioned ordinance is fairly debatable about the purpose of the ordinance then the legislative judgment must control. However, if it is not fairly debatable that the ordinance is valid, then it must be declared unconstitutional.

A total review of the facts must take place concerning the reasonableness of the zoning classification. The court must look to the opinions of the experts in an objective manner, realizing that experts can be obtained to support both sides of a zoning debate. The facts must be carefully weighed to determine whether the basis of the opinions and conclusions brought out at trial are sound.

In reviewing the facts of the instant case, we find the ordinance has no substantial relationship to the public

of Chagrin Boulevard. The U-8A zoning classification was designed to act as a buffer between the U-9 and the residential areas. The U-8A land is less restrictive than the former U-7 which relaxed the commercial prohibition but excludes any retail potential. There was evidence presented that this "line" had a certain amount of flexibility. In this case, the U-8A zoning north of the line was established to act as a buffer from the commercial and rental use property on Chagrin Boulevard. The urban factors of traffic, sewage, noise and city services were considered in the zoning determination. However, the property in question is unique in some ways.

Robert Free and Roger Ritley, real estate appraisers, both testified that the property's topography sloped toward the interstate. This can be a good or bad feature in the land's use. For purposes of the developer's plan, the key benefit of the topography was that retail enterprises could be seen from the highway, yet they could not be seen from the Richmond Road property due to the slope.

Another unique factor of the land is that the interstate landlocks the property on one side. The developed Gilmour property and land along Richmond Road do not allow exposure of the property. The fact the parcel is bounded by the highway and the developed properties on Richmond and Chagrin limits the land's usefulness under the U-8A zoning.

The limited usefulness is reflected in the reasonable market value of the acreage. Free and Ritley testified that under U-8A zoning the fair market value of the land was $50,000 per acre. Under a U-9 zoning classification both of these witnesses testified that the reasonable fair market value of the property was $90,000 per acre. Ohio does not consider economic loss alone in finding a zoning ordinance unconstitutional. *Curtiss v. City of Cleveland*

(1959), 170 Ohio St. 127. However, it is an important ingredient in the decision to determine whether the ordinance is arbitrary, unreasonable, and without a real and substantial relationship to the public health, safety, morals and welfare of the community. The economic detriment to the owner is a factor which must be balanced against the change of the land use's benefit to the community.[2]

Examining the benefit to the community more closely, this court does not see a substantial relationship to the common goals of the community. There are some beneficial aspects to U-8A zoning. The U-8A zoning would produce less automobile traffic than a more intensive commercial development. The U-8A zoning would likely produce less crime because it would have fewer commercial and retail establishments. The tax benefit to the community is a factor that is difficult if at all possible to speculate upon. However, for property tax purposes, a more expensive development would result in a greater tax income. The benefits if any were proven at trial to be significant.

There does not appear to be a substantial reason for the city to maintain the more restrictive zoning classification. The city services would not vary substantially, except for a speculative variation with police protection. However, it is possible that added city income would offset that cost. A street would have to be constructed for development under either classification. The noise and

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2. There was evidence from real estate appraiser Herbert Chisling that the property was actually worth $80,000 per acre under a U-8A zoning. Bruce Kearns, a Vice-President of Equity Planning Corp., a real estate firm, testified that his company purchased a parcel of property abutting the appellants' land on the west side. That property which had fronting on Richmond Road was in a significantly better position than the land owned by Central. This factor significantly distorted the price per acre comparison.

traffic factor is offset by the existing noise and traffic from I-271. The more intense use of the land has not created an unmanageable situation on the other quadrants of the city located along Chagrin Boulevard. Two hotels have been built in close proximity to the property and other retail establishments exist. There was no substantial evidence offered indicating how the appellants' property under a U-9 classification would have a detrimental effect on the city that a U-8A classification would not.

The city presented no evidence to demonstrate that the ordinance has a rational nonarbitrary purpose. The appellants on the other hand have demonstrated that with little or no detriment to the city the appellants could develop the land to its highest potential. One ingredient of maximization of the land use is attempting to procure the highest fair market value of that land. In the instant case, the U-9 zoning facilitates that maximization because of the versatility it provides to the developer in utilizing the land. The specific elements of the topography also allow the owners to accomplish development of the acreage with few undesired side effects.

The trial court incorrectly interpreted the Ohio case law when it stated:

> The fact that Plaintiff's proposed use of the land may be more profitable is also not legally significant.

The case law in Ohio has long held that proof of economic loss alone will not result in a finding that a zoning ordinance is an unconstitutional taking of property. *Curtiss v. City of Cleveland* (1959), 170 Ohio St. 127; *Curtiss v. City of Cleveland* (1957), 166 Ohio St. 509. However, diminution in value is to be considered in determining the validity of the statute.

> Nevertheless, proof of economic loss may be considered in determining whether there is a substantial relationship to public health, safety, and welfare. In such case, evidence as to the diminution of value of the property must be balanced against the benefit to the public health, safety and welfare derived from existing zoning. *Central Motors Corp. v. Pepper Pike, supra* at 68. *Also see C. Miller Chevrolet, Inc. v. City of Willoughby Hills* (1974), 38 Ohio St. 2d 238.

In the instant case, we find no substantial benefit to the community in limiting the development of the Central Property. There is no substantial gain in the morals, welfare or safety of the Beachwood general public as a result of the U-8A zoning application. Therefore, the action by the legislature of the City of Beachwood is arbitrary and an unreasonable restriction of the landlocked commercial property. This unreasonable and arbitrary action denies the appellants the economic enjoyment of their property without the required nexus to the public good. This important factor, while not controlling is crucial in the instant circumstances. Given the change in the character of the land since the completion of I-271, the limitations placed on the property by the U-8A classification are insufficiently related to the practical and feasible use of the land.

We, therefore, find that U-8A zoning of the land in question, while making development possible does not have a substantial nexus to the general health, morals, safety and welfare of the community to counterbalance the detrimental economic loss placed upon the appellants.

The second and third assignments of error are well taken.

IV.

The appellants' fourth assignment of error asserts that the court erred in not granting relief with respect to the installation of sanitary sewers to service the property in question. The appellants' argument revolves around a settlement that the appellants and the city were allegedly negotiating concerning the installation of sanitary sewers. The appellants allege the city failed to live up to its commitment.

The appellants' proposition is not accepted by this court. The appellants have not provided this court with a record of the alleged negotiations. Pursuant to Civ. R. 9(B), the appellants have the duty to order that part of the record they deem necessary for purposes of the appeal. This court cannot review a controversy unsubstantiated by the record.

Consequently, the appellants' fourth assignment of error is without merit.

Accordingly, the decision of the trial court is reversed and judgment is entered for the appellants.

It is, therefore, considered that said appellant(s) recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JOHN T. PATTON
Judge

JACKSON, *C.J.*, concurs,
PRYATEL, *J.*, dissents,

(See Dissenting Opinion, PRYATEL, *J.*, attached to Journal Entry and Opinion).

DISSENTING JOURNAL ENTRY AND OPINION

PRYATEL, *J.*, dissents:

I respectfully dissent as to assignments of error I, II and III, and therefore would affirm the judgment of the lower court.

Before proceeding with my dissent, I would like to present an overview of the background of the case, mindful that there will be some unavoidable duplication with the summary of facts presented by the majority.

The property at issue is a 33-acre tract of undeveloped land in the City of Beachwood, bounded on the south by Chagrin Boulevard, a major east-west artery, and on the east by Interstate 271. In fact, the eastern boundary abuts the southbound exit ramp of the freeway, following the gradual curvature of both ramp and freeway for some 3,000 feet north from Chagrin Boulevard. The northern and western boundaries form a border appearing as two large steps descending southwest back to Chagrin Boulevard. The top "step" appears as a long, narrow, rectangular neck of land, while the bottom step is broader and almost square.

In the late 1950's when appellants purchased this tract, some of the land was zoned for single-family residential use (U-1A-1) and the remainder was zoned for research and testing laboratory use (U-7). The U-7 classification is a restricted commercial use, requiring low-density building space with a three-story maximum height restriction.

In 1968, at appellants' request, six acres bordering the I-271 exit ramp on the eastern boundary and abutting Chagrin Boulevard on the south were rezoned for "motor service" use (U-9). The U-9 district is a less restrictive use allowing the erection of motels, hotels, restaurants, gas

stations and, notably, automobile agencies (Ord. 1111.-02(n)). The use is considered to be highly intensive for commercial purposes, imposing less restrictive building-to-land area ratios and allowing buildings up to 60 feet in height.[1]

From the later 1960's through the 1970's the land surrounding the Chagrin-I-271 interchange became highly developed for commercial and retail purposes. Upon application of the various property owners, most of these properties in the northeast, southeast and southwest quadrants of the interchange were rezoned for U-9 use. Adjacent to appellants' land, running west along the north border of Chagrin, is a car dealership and gas station. Except for a thin strip of appellants' land (zoned U-8A),[2] the property bordering the north side of Chagrin is zoned for U-9 use. While appellants' 33 acres and most land to the west of the property are zoned U-8A, the land to the north and northwest of appellants' property is zoned for single-family residential use.

In 1974, appellants began an unsuccessful attempt to have their remaining 33 acres rezoned to U-9 use. Frank Porter testified at length concerning the proposal submitted to the City at that time calling for the erection of several automobile dealerships, multi-story office and apartment buildings, a roadway, plus improvements of utilities, including construction of storm and sanitation sewage systems.

The City Planning Commission rejected the plan.

Subsequently, the City rezoned some 10 acres for U-9 use in the southwest quadrant of property south of Chagrin

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1. Appellants had apparently been negotiating with Schraft Corp. to build a motel; however, the venture was never realized.

2. See assignment of error #1.

for the erection of a multi-story motel. Thereupon, appellants filed suit against the City, claiming that it was arbitrarily and unconstitutionally enforcing its zoning code. Appellants later voluntarily dismissed the suit, according to Porter, only upon assurances by the City's Law Director that the City would aid appellants in pursuing their original proposal to rezone their property.

However, the City still refused to grant appellants' request. In 1978, appellants filed the instant action in the common pleas court, requesting the court to declare as unconstitutional the U-7 zoning of its 33 acres of land north of Chagrin. Soon thereafter, in an attempt to accommodate appellants, the City rezoned the 33 acres to the present U-8A classification.

Appellants filed this suit in 1978 because they were not satisfied with the new U-8A classification for their 33-acre parcel.

The U-8A use is less restrictive than the prior U-7 use, allowing for a greater building density, although still limiting building height to 35 feet. However, the classification prohibits all retail use. Since the land to the north and northwest of appellants' property is zoned for single-family residential use, while appellants' 33 acres and most land to the west of the property are zoned U-8A, the new zoning classification still serves as a ring of protection for the adjacent residential owners from an unrestricted retail zoning classification such as appellants seek. This U-8A classification, as previously stated, was intended as an accommodation to appellants' desire to develop their property profitably by reducing the intensity of the previous classification to permit some commercial activity short of unrestricted retail usage.

As to assignment of error I, concerning the zoning of the 150-foot strip along Chagrin Boulevard, I agree with

appellee that this position was not argued below by appellants, and hence is not subject to our review. *Shibley v. Time, Inc.* (1975), 45 Ohio App. 2d 69, at 75; *Webb v. Grimm* (1961), 116 Ohio App. 63, at 73. This point is not the primary focus of my dissent, especially since the appellee has indicated in open court that upon proper application, a mutually satisfactory arrangement could be worked out regarding this U-8A strip wedged between two U-7 parcels.

Instead, my primary concern comes under assignments of error II and III in that the majority has not properly applied the "fairly debatable" test to the validity of the present zoning classification for the 33-acre tract, as we are required to do in testing appellants' burden of proof in challenging the constitutionality of this zoning ordinance. *See Central Motors, Inc. v. Pepper Pike* (1979), 63 Ohio App. 2d 34. In my judgment, appellants have not met the burden of proving beyond a fairly debatable question that the ordinance is arbitrary and confiscatory and has no rational relationship to the City's interest in preserving public health, safety, morals and welfare. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23.

Applying the "fairly debatable" test to the evidence as to the validity of the City's zoning of this parcel as U-8A, reasonable minds could surely differ as to the ordinance's validity. In opposition to testimony cited by the majority is the testimony presented by witnesses for the City in support of the reasonableness of the present classification which the majority ignores. For example, City Planner Robert Perry, who works for the Regional Planning Commission and has served as a planning advisor to Beachwood for a decade, testified that the City has consistently maintained the area in question as a kind of barrier or

buffer between residential and retail uses. As such, Perry testified that the line of demarcation was drawn from 500'-800' north of Chagrin Boulevard and that appellants' proposed plan for retail development north of this line was contrary to the City's desire to restrict such retail intrusion. He stated that the commission had recommended the U-8A classification as a less-restrictive substitute for the prior U-7 classification to allow more flexibility in building non-retail, commercial and administrative office facilities, and that the U-8A use was reasonable for development of appellants' property.

Economic considerations alone cannot be determinative in resolving these issues. Even though the majority takes note of this legal principle (at p. 15), they ultimately base their holding on economic considerations in a manner which I find to be a distortion of the law. But even if one accepted the majority's position that appellants' "economic enjoyment of their property" is "crucial" to the case at bar—an approach with which I vigorously disagree[3]—we have two conflicting portrayals of the ordinance's economic impact given at trial. On the one hand, according to appellants' evidence, the present fair market of this tract is $50,000 an acre versus the $90,000 an acre which the tract would allegedly be worth if rezoned for retail use under U-9; whereas, according to appellee's evidence (in support of their position that the current U-8A use is reasonable), the appellants' property has a market value of some $80,000 per acre in its present U-8A classification. Indeed, one of the City's witnesses, Bruce Kearns, a vice-president of a real estate firm, testified that his company had recently purchased property in the vicinity zoned U-8A (the same classification as appellants' property) for over $80,000 an acre. Does not this make even the issue of the parcel's cur-

3. *See, Curtiss v. City of Cleveland* (1957), 166 Ohio St. 509.

rent economic worth on which the majority places so much emphasis a "fairly debatable" one?

In summary, the record shows appellants failed to raise the issue beyond fair debate. Moreover, deference must be accorded to the trial court who, after exposure to the witnesses when he heard the evidence, upheld the ordinance as a reasonable and valid exercise of the City's police power.[4] While appellants' proposed use may be more profitable for them, we cannot ignore the well-established rule of law that maximizing a landowner's profits is not the controlling standard by which to assess the reasonableness of an ordinance. *Central Motors, Inc. v. Pepper Pike, supra; Flair Corp. v. Brecksville* (1976), 49 Ohio App. 2d 77.

Embodied in the "fairly debatable" test to be applied in these cases is a policy of judicial restraint on the part of the reviewing court, as explicated by the Supreme Court in *Willott v. Beachwood* (1964), 175 Ohio St. 557, at 559-60:

> "The power of the court in such matters as this is extremely limited, and the court can not usurp the legislative function by substituting its judgment for that of the council. Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts.
>
> "The determination of the question of whether regulations prescribed by a zoning ordinance have a real or substantial relation to the public health, safety, morals or general welfare is committed, in the first instance, to the judgment and discretion of the legislative body. Where such a judgment deals with the control of traf-

---

4. For the well-known maxim that the reviewing court should not supplant the trial court's judgment on the weight of the evidence and credibility of witnesses, *see, State v. DeHass* (1967), 10 Ohio St. 2d 230.

fic, volume of traffic, burden of traffic, effect upon valuation of property, municipal revenue to be produced for the city, expense of the improvement, land use consistent with the general welfare and development of the community as a whole, or, in short, where the judgment is concerned with what is beneficial or detrimental to good community planning, it is in the first instance a legislative and not a judicial matter. The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and *the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable.*" (emphasis added).

See also, Mintz v. Pepper Pike (1978), 57 Ohio App. 2d 185, at 192.

Sufficient expert testimony presented by the City has indicated that the existing classification is an economically reasonable one, and that the City has a rational land-use scheme whereby some flexibility as to development is permitted on U-8A parcels while still precluding retail business and the problems associated with retail establishments from developing in those areas adjoining residential property. To override the present zoning classification approved by the City Council on the strength of the evidence presented at this trial in my view makes a mockery of the City's lawful right to exercise and enforce reasonable land use controls on behalf of its citizens.

For all the above reasons, I would uphold the constitutionality of the City's ordinance as applied to appellants' tract in affirming the court below.

ORDER OF THE SUPREME COURT OF OHIO DENYING REVIEW

(Dated November 25, 1981)

No. 81-1547

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

CENTRAL MOTORS, INC., *et al.*,
Appellees,

VS.

CITY OF BEACHWOOD,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO DENYING CERTIFICATION OF THE RECORD

(Dated November 25, 1981)

No. 81-1547

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

CENTRAL MOTORS, INC., *et al.*,
Appellees,

VS.

CITY OF BEACHWOOD,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated January 13, 1982)

No. 81-1547

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

GENERAL MOTORS, INC., *et al.*,
Appellees,

vs.

CITY OF BEACHWOOD,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

1111.02 Classification of Uses.

For the purpose of this Zoning Code, the various uses to which buildings and premises can be devoted are divided into groups, classes and subdivisions as set forth in the following classification. These uses, hereinafter classified as Class U-1, Class U-2, Class U-2A, Class U-3, Class U-3A, Class U-4A, Class U-4B, Class U-7, Class U-7A, Class U-8, Class U-8A and Class U-9, are permitted under regulations herein set forth in the respective use districts allotted to such uses. These uses classified as Class U-5 are permitted under special circumstances and after compliance with requirements hereinafter set forth, and those classified under Class U-6 are prohibited entirely.

(a) *Class U-1 Uses.*

(1) Single-family dwellings.

(2) Farming or truck garden.

(b) *Class U-2 Uses.*

(1) Multiple-family dwelling.

(c) *Class U-2A Uses.*

(1) Attached single-family homes.

(d) *Class U-3 Uses.*

(1) Apartment houses.

(e) *Class U-3A Uses.*

(1) High-rise apartments.

(f) *Class U-4A Uses.*

(1) Stores selling commodities at retail such as, but not necessarily limited to:

A. Groceries; supermarkets; bakeries; delicatessens.

B. Eating and drinking places, without entertainment.

C. Drug stores.

D. Wearing apparel stores.

E. Variety stores.

F. Paint and wall paper, hardware stores.

G. Furniture; household appliances; drapery; floor covering; radio and television stores.

H. Florist; gift; jewelry; sporting goods stores.

(2) Service establishments such as, but not necessarily limited to:

A. Barber; beauty shops.

B. Dry cleaning in which only nonexplosive and nonflammable solvents are used; self-service laundries; hand laundries; tailor shops.

C. Radio and television repair.

In each permitted establishment in subsections (2)B. and C., no work shall be done on premises for other outlets.

D. Banks and savings and loan associations.

E. Indoor recreation and athletic facilities, such as indoor tennis, handball or squash courts, exercise rooms, sauna baths, pools and the like, limited to the following conditions:

1. A use shall be the principal use of a free-standing building and totally enclosed within the building.

2. No accessory restaurant, bar or other eating or drinking establishment shall be permitted as an accessory to the main use. However, vending machine sales of prepackaged foods and non-alcoholic beverages are permitted.

(g) *Class U-4B Uses.*

(1) Shopping centers.

(h) *Class U-5 Uses (Special Permit).*

(1) School houses.

(2) Churches.

(3) Public parks.

(4) Community center building or municipally-owned buildings.

(5) Water tower or reservoir.

(6) Suburban or interurban electrical railway passenger station.

(7) Private club, except a club whose chief activity is a service customarily carried on as a business.

(8) Greenhouses or nurseries.

(9) Such other uses as may not be inconsistent with the spirit and objects of this Zoning Code.

(i) *Class U-6 Uses (Prohibited).*

(1) Billboards and advertising devices except signs advertising premises for sale, lease or rent, upon which premises such sign is located, or for advertising the business conducted in the building upon which such sign is placed.

(2) Garbage, dead animals or offal disposal or reduction plant.

(3) Slaughtering of fowls and/or animals.

(4) Cemeteries.

(5) Crematories, mortuaries (funeral homes).

(6) Penal and correctional institutions.

(7) Veterinary hospitals.

(8) Orphan asylums or institutions for the infirm or destitute persons.

(9) Institutions for the insane or feebleminded.

(10) Lumber, coal or building supply yards.

(11) Scrap iron or junk storage, scrap paper or rag storage or baling, junk or used automobile yard or storage.

(12) Manufacturing or other business, which by reason of noise, smoke, vibration, odor or its inherent nature may constitute or may threaten to become a public nuisance or may endanger the public health, safety and general welfare.

(13) Motor freight depot.

(14) Trailer camp or park.

(15) Used car lot or used car sales, except in conjunction with an automobile sales agency selling new automobiles.

(16) Drive-in theaters.

(17) Antennas for broadcasting and receiving, except as permitted in Section 1129.02(b), except in a U-1 District, and except for antennas for receiving commercial radio and television broadcasts in any district.

(j) *Class U-7 Uses.*

(1) Professional, administrative, executive, sales and governmental office buildings.

(2) Laboratories: basic and applied research for experimental or testing, provided research of production processes is limited to laboratories or small pilot operations.

(k) *Class U-7A Uses.*

(1) Professional, administrative, executive, sales (without samples and merchandising services), governmental and public utility offices.

(2) Services of a limited nature such as beauty and barber shops, photographic developing and blueprinting.

(3) Telephone exchanges.

(4) Nursing homes.

(l) *Class U-8 Uses.*

(1) Business, professional, public utility and governmental offices.

(2) Wholesale offices and showrooms with accessory storage of goods limited to those permitted in this Class U-8 District.

All permitted uses listed below shall have at least ten percent of the gross floor area of the ground floor of the main building used for office purposes in conjunction with the operation of the main use. The Planning and Zoning Commission may waive this requirement, with the approval of Council, for lots the total area of which is four acres or more. The Planning and Zoning Commission may also waive this requirement, with the approval of Council, if additions are made to the original building containing the main use if such addition does not exceed twenty-five percent of the gross floor area of the original building.

(3) Laboratories: research, experimental and testing.

(4) Storage and distribution establishments for finished or packaged goods limited to:

A. New parts for automobiles, trucks and trailers.

B. Beverages and foods, except fresh fruits and vegetables.

C. Furniture, carpets, rugs and other household goods.

D. Wood products, electrical, masonry, plumbing, heating, ventilating, air conditioning, painting, ornamental iron, roofing and sheet metal products.

E. Local parcel delivery stations.

F. Goods used in or produced by the activities permitted in subsections (k) (5) and (6) hereof.

(5) Service establishments limited to:

A. Bottling works for all beverages with preparation limited to the use of previously processed basic liquids or solids.

B. Cleaning and dyeing establishments limited to: Laundries, dry cleaning, carpet cleaning towel supply.

C. Repair establishments limited to: Electrical and household appliances; goods produced by the manufacturing and assembly processes permitted in subsection (k) (6) hereof.

(6) Manufacturing and assembly limited to the following processes and products:

A. Fabrication, stamping, extrusion, welding, finishing, polishing and assembly of small products limited to:

1. Musical, medical and small engineering, scientific and measuring instruments.

2. Orthopedic and medical appliances.

3. Assembly of electrical equipment such as home radio, phonograph and television receivers, home movie equipment.

4. Electric and mechanical control and communication devices and equipment.

5. Electrical supplies such as wire and cable assembly, switches, motors, lamps, insulation and dry cell batteries.

6. Small electric appliances such as lighting fixtures, motors, lamps, insulation and dry cell batteries.

7. Small electric appliances such as lighting fixtures, irons, toasters, fans, electric toys.

8. Cutlery, kitchen utensils.

9. Cameras and other photographic equipment, watches, clocks.

10. Toys, sporting goods and athletic equipment.

11. Jewelry, pins and needles, razor blades.

B. Cosmetics, drugs and toiletries; compounding of pharmaceutical products from previously processed chemicals and other products.

C. Clothing and other textile products, leather goods from previously manufactured yarns and leathers.

D. Fabrication of furniture and cabinets.

E. Printing, publishing and engraving.

(7) In addition, the following uses shall be permitted:

A. Main and carrier postal station.

B. Fire and police stations.

C. Telephone exchange.

D. Utility pumping station.

E. Electrical distribution substation.

(m) *Class U-8A Uses.*

(1) Professional, administrative, executive, governmental and public utility offices, excluding health services.

(2) Research and development laboratories or testing offices.

(3) Wholesale offices and showrooms.

(4) Manufacturing and assembling as permitted in Class U-8.

(n) *Class U-9 Uses.*

(1) Gasoline service station.

(2) Motels and hotels.

(3) Restaurants and eating places where food is consumed in an enclosing building.

(4) Automobile agencies.

(5) Banks.

(6) Office buildings.

1130.01 Intent

This chapter (Class U-8A District) is established, among other purposes, to control and regulate permitted uses in this District and other similar uses. The intent is to regulate and encourage limited manufacturing, research and development laboratories, office complexes and

wholesale offices within close proximity to interstate transportation and developed in such a manner that all buildings will function as a unified high quality science and office park. The development standards are designed to ensure a park-like environment not only for the benefit of uses within the District but to protect and harmonize with the surrounding residential areas of the City.

1131.01 Intent.

It is the intent of this chapter (Class U-9 Districts) to provide motor service districts on major roads in the immediate vicinity of freeway interchanges to serve the needs of through and local motorists. (Ord. 1967-10. Passed 2-20-67.)

Appendix

CITY OF BEACHWOOD

ZONE MAP

SHOWING ALL AMENDMENTS TO AND INCLUDING ORDINANCE NO. 1972 -121 ADOPTED BY THE COUNCIL OF THE CITY OF BEACHWOOD, OHIO NOVEMBER 6, 1972

APPROVED BY THE PLANNING COMMISSION OF THE CITY OF BEACHWOOD OHIO MAP UPDATE NOVEMBER 30, 1972

SUMMARY SCHEDULE REFER TO ZONING ORDINANCE TEXT FOR ALL STANDARDS AND REQUIREMENTS

CLASS AND AREA	DISTRICT	MINIMUM LOT AREA / FAMILY SQ. FT.	SETBACK FT.	MAXIMUM % COVERAGE	MAXIMUM HEIGHT FT.	PARKING
U-1A-1						
U-1A-2						
U-2						
U-2A*						
U-3						
U-3A*						
U-4A						
U-4B						
U-7						
U-7A						
U-8						
U-8A*						
U-9						

AMENDMENTS AFTER 1972 - 121

ORDINANCE NUMBER	DATE	DESCRIPTION

REGIONAL PLANNING COMMISSION
Cuyahoga County, Ohio

Opposition

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1771

In the Supreme Court of the United States

October Term, 1981

CENTRAL MOTORS INC., and FRANK PORTER,
Respondents,

vs.

CITY OF BEACHWOOD, OHIO,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS

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TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents will amplify to some extent the background of this case presented by Petitioner in its "Statement of the Case."

Procedural Background

Respondents originally filed an action in February, 1976, challenging Petitioner's zoning. This followed twenty-three (23) meetings with Petitioner's Planning and Zoning Commission in 1974 and 1975. When the matter came up for trial, as stated by the Court of Appeals in its Opinion (Petition for Writ of Certiorari, A13-A14):

"The city came to an agreement with the appellants resulting in a voluntary dismissal of the suit. Porter testified that the city law director had agreed to aid appellants in pursuing the rezoning for the 33 acres which would enable them to implement their development proposal.

"The city refused to grant their zoning request and as a result of the city's refusal, the appellants filed the instant action in 1978."

Statement of Facts

Respondents' property is in the Northwest quadrant of the regional highway interchange of Interstate Highway 271 and Chagrin Boulevard in Beachwood, Ohio. The other three (3) quadrants of this interchange have been intensively developed, with Petitioner's cooperation, by zoning changes, for intensive commercial and retail use for occupancy by motels, a car dealership, gas stations, restaurants and office buildings (The Beachwood Zoning Map appended to the Petition for Certiorari). Just across the Petitioner's boundary line on the Northeast quadrant in an adjacent municipality, Woodmere, is a Shopping Center. In Respondent's quadrant there is a restaurant, gas station and auto dealership, among other buildings.

Respondents' land has a limited frontage on Chagrin Boulevard of approximately One Hundred Fifty (150) feet. The land generally slopes downward toward the freeway and runs adjacent to, and alongside, the freeway (I-271) for about 2800 feet North of Chagrin Boulevard. Respondents' land has no exposure to the nearest North-South Road to the West, Richmond Road, and is not visible therefrom. Except for the limited frontage on Chagrin Boule-

vard, Respondents' land is landlocked. Ingress to, and egress from, Respondents' land is further limited by its proximity to an exit ramp of I-271.

The U-8A classification which Petitioner imposed on much of the land in the Northwest quadrant of the interchange is found nowhere else in Beachwood. The change from the U-7 classification to U-8A was made in June, 1978, following the institution of Respondents' action in January, 1978. Petitioner even assigned the U-8A classification to a narrow corridor of Respondents' property between the six (6) acres of Respondents' property already zoned U-9 and other property, to the West of Respondents' property, already zoned U-9. Up until December, 1975, much of Respondents' land had been zoned U-1A-1 (Single Family).

The U-8A classification is designed for lower density "science park" developments.

The U-8 industrial park to which Petitioner alludes on Page 7 of its Brief concerns land further from the freeway. The U-8 classification also permits a much more intense use than the U-8A classification.

The evidence showed that far from having a master plan covering this freeway intersection, Petitioner had made frequent changes in zoning on the other quadrants after Respondents' suit was filed to accommodate other property owners (See zoning map attached to Petition for Writ of Certiorari—lower left hand corner—"Amendments after 1972-121"). In effect, Petitioner was maintaining a land bank in the area in question extending U-9 zoning, and retail zoning (U-4A) on a pick and choose basis.

Petitioner's own appraisal expert, Mr. Herbert Chisling, admitted on cross-examination that he had testified, as an

appraiser in a tax proceeding involving this land, that this land would be good property for a retail or commercial development.

The evidence showed that the U-9 use sought by Respondents was *not* the highest fair market value classification, but that the U-7A classification would produce the highest fair market value (Petition for Writ of Certiorari, p. 8—breakdown of appraisers' valuations).

REASONS FOR NOT GRANTING THE WRIT

Ohio's basic zoning law has been firmly established for years. The Court of Appeals stated the basic principles in its Opinion (Petition for Writ of Certiorari, p. A16) in substance as follows:

> (1) "The party challenging the zoning ordinance's constitutionality bears the burden of proving beyond fair debate that the ordinance is arbitrary and confiscatory."
>
> (2) "The party challenging must prove that the alleged arbitrary and confiscatory ordinance is unreasonable in that it does not further a goal that relates to the public health, safety, morals or general welfare goals of the community."

Euclid v. Ambler Realty Co. (1926), 272 U.S. 365; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23; *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34; *Mayfield-Dorsch, Inc. v. City of South Euclid* (1981), 68 Ohio St. 2d 156, 22 Ohio Op. 3d 388; *Leslie v. Toledo* (1981), 66 Ohio St. 2d 488, 20 Ohio Op. 3d 406; *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93, 20 Ohio Op. 3d 88; *Hilton v. Toledo* (1980), 62 Ohio St. 2d 394, 16 Ohio Op. 3d 430.

In *Mayfield-Dorsch, Inc. v. City of South Euclid, supra,* which was decided by the Supreme Court of Ohio on December 16, 1981, shortly following its denial, on November 25, 1981, of Petitioner's Motion for Certification, and shortly before its overruling, on January 13, 1982, of Petitioner's Motion for Reconsideration, the Ohio Supreme Court stated (on page 157):

> "It is a fundamental principle of Ohio zoning law that appellees, the parties challenging the validity of a zoning classification, have, at all stages of this litigation, the burden of demonstrating the unconstitutionality or unreasonableness of the Zoning Code . . . Zoning Ordinances which are enacted pursuant to a municipality's police powers are presumed valid until the contrary is clearly shown by the party attacking the ordinance."

In the very next paragraph of its Opinion in that case, the Ohio Supreme Court stated:

> "Moreover, a successful declaratory judgment challenge must demonstrate beyond fair debate, that the zoning classification is unconstitutional, unreasonable and not substantially related to the public health, safety, morals or general welfare."

The decision in this case by the Court of Appeals was measured by those standards.

In Petitioner's Motion in support of Jurisdiction to the Ohio Supreme Court, Petitioner submitted the following as its first of two Propositions of Law (A1):

> "A party challenging a municipal zoning code has the burden of demonstrating that the relevant sections of the zoning code are either facially unconstitutional or unconstitutional as applied to that party."

The Court of Appeals required that the evidence be beyond fair debate and thus adopted a more stringent standard from that set forth by the Petitioner.

Petitioner's other Proposition of Law submitted to the Ohio Supreme Court was as follows (A1):

> "Failure of a municipality to zone property for its highest and best use does not render the zoning ordinance unconstitutional as a matter of law. Zoning enactments causing economic loss and diminution of value, alone, are not an unconstitutional taking of property without due process of law."

In that respect also the Court of Appeals had adopted in its consideration of the case the law urged by the Petitioner. In the Court's Opinion (Petition for Writ of Certiorari, page A24) the Court of Appeals stated the rule as follows:

> "The case law in Ohio has long held that proof of economic loss alone will not result in a finding that a zoning ordinance is an unconstitutional taking of property. *Curtiss v. City of Cleveland* (1959), 170 Ohio St. 127; *Curtiss v. Cleveland* (1957), 166 Ohio St. 509. However, diminution in value is to be considered in determining the validity of the statute."

Thus, the very principles of law which Petitioner urged upon the Supreme Court of Ohio *were* the principles of law followed by the Court of Appeals in its Opinion.

In effect, then, the Petitioner was not claiming any error in the law followed by the Court of Appeals. Petitioner, at most, was contending that the Court of Appeals reached incorrect conclusions of fact.

This Court has upheld zoning ordinances as against landowners' challenges under the Fifth and Fourteenth

Amendments provided the ordinance is rationally related to the public health, safety, morals or general welfare notwithstanding diminution in market value provided an economically viable use of the property remains. *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S. Ct. 2138.

In this case the Ohio Court of Appeals addressed the problem within those standards. It adopted the principles of law which Petitioner thereafter proposed to the Ohio Supreme Court.

The Ohio Court of Appeals first found as to the 150 foot strip fronting on Chagrin Boulevard that Respondents had "demonstrated that the ordinance's application is unconstitutional and beyond the reach of fair debate. . . ." and that the "application of the U-8A classification is unreasonable and not in the interest of public health, safety, morals and the general welfare of Beachwood citizens" (Petition for Writ of Certiorari", A18).

As to the balance of Respondents' property the Court of Appeals analyzed the evidence in the case and concluded that the ordinance lacked any substantial nexus to the health, safety, morals or general welfare and that its application to the Respondents' property denied the Respondents the economic enjoyment of their property without the required nexus of the public good. The Court concluded:

> "Given the change in the character of the land since the completion of I-271, the limitations placed on the property by the U-8A classification are insufficiently related to the practical and feasible use of the land." (Petition for Writ of Certiorari, A25.)

The Ohio Court of Appeals considered the diminution of value resulting from Petitioner's zoning classification

as one factor in reaching its conclusion. Another factor considered was the dramatic change in the character of the area resulting from the construction of I-271 which made that interchange one of the busiest in the most populated county in Ohio. A "science park" in that location just does not make sense. The Ohio Court of Appeals found that there was not the required nexus to the public good in Petitioner's zoning.

It should also be pointed out that the Beachwood Zoning Ordinance itself provides, with respect to the U-9 classification which Respondents sought, and the Court of Appeals granted:

"Section 1131.01 Intent

> It is the intent of this chapter (Class U-9 Districts) to provide motor service districts on major roads in the immediate vicinity of freeway interchanges to serve the needs of through and local motorists." (Petition for Writ of Certiorari, A46.)

Chagrin Boulevard is a major road in Beachwood. Its intersection with Interstate 271 is one of the major freeway interchanges in Cuyahoga County. Beachwood has stated clearly in Section 1131.01 of its Zoning Ordinance that its purpose is to provide U-9 districts in such areas. It has done so on the other three (3) quadrants of the interchange, as well as partially on the affected quadrant. Its argument regarding its master zoning plan as to Respondents' land disintegrates in the wake of its own stated intentions and its own actions.

The Court of Appeals found that Beachwood's zoning as to Respondents' land was not rationally related to the public health, safety, morals or general welfare. It followed the legal principles enunciated by the Ohio Supreme

Court both before and after the disposition of this case by the Court of Appeals.

Petitioner in its "Reason for Granting the Writ" completely misstates what the Court of Appeals did and, in so doing, attributes it to the Ohio Supreme Court.

The Court of Appeals did not hold that the failure to rezone Respondents' property was arbitrary and unreasonable just because the zoning was not for its highest fair market value. The Court did state that it was one ingredient to be considered. The Court of Appeals did hold, on all the facts before it, that Petitioner's zoning did not bear any substantial relationship to the public health, safety, morals or welfare. As shown before, the U-9 classification sought by Respondents would not produce the highest market value.

Petitioner's Motion in support of Jurisdiction to the Supreme Court of Ohio simply restated the very principles of law which the Court of Appeals had enunciated as those guiding its decision. Petitioner, therefore, raised no question for the Supreme Court to review and its Motion to Certify was denied by the Supreme Court of Ohio. Petitioner thereafter filed a Motion for Reconsideration which was also denied.

This case does not raise any new legal questions nor does it produce any direct, irreconcilable or demonstrable conflict with other cases. The Ohio Court of Appeals simply determined that on the facts of this case Respondents had met the burden of proving beyond fair debate that the ordinance was, as to Respondents' land, arbitrary and unreasonable and that it did not further a goal relating to the public health, safety, morals or general welfare of Beachwood. The Ohio Supreme Court thereafter declined to hear the case.

Petitioner has devoted much of its Brief to an attack on Respondents' profit motives. The evidence was that the U-9 classification sought by Respondents was not the zoning classification yielding the highest fair market value (Petition for Writ of Certiorari, p. 8). This Petition is, therefore, wholly premised on an incorrect statement of facts and should be denied.

Respectfully submitted,

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Appendix

APPENDIX

Petitioner's Propositions of Law to the Supreme Court of Ohio

PROPOSITION OF LAW NO. 1

A PARTY CHALLENGING A MUNICIPAL ZONING CODE HAS THE BURDEN OF DEMONSTRATING THAT THE RELEVANT SECTIONS OF THE ZONING CODE ARE EITHER FACIALLY UNCONSTITUTIONAL OR UNCONSTITUTIONAL AS APPLIED TO THAT PARTY.

PROPOSITION OF LAW NO. 2

FAILURE OF A MUNICIPALITY TO ZONE PROPERTY FOR ITS HIGHEST AND BEST USE DOES NOT RENDER THE ZONING ORDINANCE UNCONSTITUTIONAL AS A MATTER OF LAW. ZONING ENACTMENTS CAUSING ECONOMIC LOSS AND DIMINUTION OF VALUE, ALONE, ARE NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.